

A  
TREATISE  
ON  
Distributive JUSTICE.

Chiefly confin'd to the  
Consideration of WILL MAKING.

To which is annexed,  
The Last Will and Testament of a  
PREMIER, lately deceased.

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*Respicere exemplar vitæ morumque Jubebo  
Doctum imitatore, et vivas hinc ducere voces —* HOR. AR. PO.  
*Discite Jusitiam moniti et non temnere divos.* VIRGIL.

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THE SECOND EDITION.

*By Wm. Perry Esq*



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LONDON:

Printed for WILLIAM OWEN, at *Homer's Head*,  
*Temple-Bar.* MDCCLII. (Price One Shilling.)

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May 14. 1924





THE  
PREFACE.



*N* Author when he publishes, should consider the *cui bono*, to what good End his Labour may tend? He who reads this Treatise, will also do well to take with him the Purport of an old English Adage, that a burnt Child dreads the Fire: What I mean is, if a Man set down his Opinion on Matters wherein he has suffered, and himself felt; he will be more likely to obtain the desired End of convincing others. For my Part, I confess that a Benjamin's Portion of Vexation, derived from the unnatural and unjust Attempt of a Relation, first made me put Pen to Paper on the Subject of unjust Wills, the chief View of this Treatise:

Wherein I have set out with shewing the Opinion of all good Men, both antient and modern, on the Efficacy of Justice; whereby, if possible to induce some, who are estrang'd from her Paths, to regain them. By demonstrating Justice to be the fine quâ non.

It is a Remark of Monsieur Dacier's, (a) that there is nothing one ought so much to dread, as opposing one's own private Sentiments against the general Consent of public Opinion: Yet perhaps Mankind for the most Part form their Ideas of Right or Wrong on a vulgar Basis; so that Custom shall frequently outweigh a Man's soberer Judgment. How, therefore, shall I fare, when the chief View of these Sheets is aimed at mowing down public Prejudices? And which for that Reason will be found as Caviar to the Multitude (b). But I write not for Applause, and the helping one single Soul to a just Way of acting, will be deemed by me a sufficient Recompence for my Pains. And, as I observed, I have been a Sufferer in the Matter written of, so may I also be supposed somewhat the abler to treat on this Subject. For, as saith Polybius (c), "We do

(a) La Vie de Marc Antonius, p. 48.

(b) Et nescio quomodo [is, qui auctoritatem minimum habet, maximam vim] populus cum illis facit. Cicero de Fin. Lib. II. p. 866, Edit Verburg.

(c) Lib. VI.

“ not esteem him a good *Workman* who hath  
 “ not yet wrought at his *Trade*; nor him a  
 “ skilful *Musician* who never touched an *In-*  
 “ strument;” so neither can he who writes  
 by *Theory*, and not *Experience*, so properly han-  
 dle his *Pen*.

I would not, in the following *Sheets*, be  
 thought to blame the present *Method* of distri-  
 buting *Justice* to *Particulars*; Surely an *At-*  
 tempt of that Sort, must infallibly be attended  
 with little *Success*. For if a *Man* were to set  
 about to find *Fault* with the *Rule* with us of  
 determining *Right* by *Judge* and *Jury*; and  
 afterwards in case of too strict *Law* being ob-  
 served, which is oftentimes the *Cause* of the  
 greatest *Injury*; the *Appeal* we may make to  
 the *Chancellor*, and from him to the *Upper*  
*House*. To find *Fault*, I say, with such a no-  
 ble *Plan* for administering *Justice* by, would  
 be the *Part* of either a *Madman* or a *Fool*.  
 No *Nation* certainly has the like *Advantage*  
 with the *English* in this *Point*, where neither  
 the *Rack* nor *Threats*, nor *Power* of *Princes*,  
 can be at all used to subvert the natural *Chan-*  
*nel* of the *Law*, and *Justice*. Without, in-  
 deed, we may join with us, our *Brethren* the  
*Irish*; who have this further *Circumstance* of  
*Happiness* appertaining to the *Determination* of  
 their *Upper House*, viz. that they may be re-  
 lieved from any *Mistakes* or *Blunders*, that  
 may



*may have happened by a final Appeal to our Lords: And thereby the Merit of their Case is once more considered, than ours can possibly be.*

*I shall confine myself therefore to private Justice, such as we require in the common Occurrences of Life from others; and to such as we ourselves in return pay. And here it may not be amiss to consider what is, and at least what has been esteemed and taken for Justice, by the reasoning and reflecting Part of the World.*





A  
TREATISE

ON  
Distributive JUSTICE.



JUSTICE, according to Cicero (a), is much the most glorious and shining of all Virtues, and alone intitles us to the Appellation of *good Men*; and requires of us, that we should not hurt one another, unless by way of reasonable and just Retribution for some Injury received: And that whatever Things belong to all in common, or to particulars as their own, should not be changed but be made use of accordingly. And he tells us

(a) *De officiis, Edit. Ver. Vol. 4. C. 7. p. 1244.*

B

from

from *Plato*, that we are not born for ourselves alone, but that our native Country, our Friends, and Relations, have a just Title, and claim to some part of us : And he in the same Chapter says, the great Foundation of *Justice* is *Faithfulness* ; which consists in being stedfastly firm to our Word, and conscientiously performing all our Agreements and Bargains, and supposes that *Fides* (*Faithfulness*) is fetch'd *quia fiat quod dictum est*, because what was promised was performed.

*Puffendorf* (a) says, “ we are in the next  
 “ Place to discourse of *Justice* : Concerning  
 “ which it ought to be our first Observa-  
 “ tion, that the Signification of this Term,  
 “ as applied to *Persons*, is very different  
 “ from that, by which it denotes an *Attri-  
 “ bute of Actions*. For when we use it,  
 “ with Regard to *Persons* to be *just*, imports  
 “ as much as to delight in acting *justly* ; to  
 “ study after *Justice* ; or to endeavour in  
 “ every Thing to do what is *just*. And to  
 “ be *unjust*, is to neglect *Justice* ; or to think  
 “ it should be measured, not according as  
 “ it is really due, but as it suits with pre-  
 “ sent Advantage. So that a *just* Man, may  
 “ perform several *unjust* Actions ; and an

(a) *Law of Nature and Nations*, B. 1. Ch. 7.  
 Sect. 6.

“ *unjust*



“ *unjust* Man several *just* Actions. For he  
 “ is to be esteemed a *just* Person, who doth  
 “ *just* Things in Obedience to the Law ; and  
 “ *unjust* Things only through Infirmitv :  
 “ And he an *unjust* Person, who doth *just*  
 “ Things in fear of the Punishment annex-  
 “ ed to the Law ; and *unjust* Things either  
 “ out of Perverseness or Pravity of Mind ;  
 “ or for the procuring of Glory, or any o-  
 “ ther seeming Benefit. Hence it appears,  
 “ that the Definition of *Justice*, so much  
 “ in vogue with the *Roman* Lawyers, in  
 “ which they call it a constant and perpe-  
 “ tual Inclination to give every one his  
 “ Due, belongs to the Justice of *Persons*,  
 “ not to that of *Actions* ; and this we take  
 “ to be very inconvenient. Inasmuch as  
 “ the Science of Law is chiefly employed  
 “ about the Justice of *Actions*, and touch-  
 “ eth on the Justice of *Persons*, only by the  
 “ by, and in some few Particulars.

“ The *Justice* of Actions differs from  
 “ their *Goodness*, chiefly in this, that *Good-*  
 “ *ness* barely denotes a Conformity to the  
 “ Law ; but *Justice* farther includes a re-  
 “ spect to those Persons towards whom the  
 “ Actions are performed. So that we ap-  
 “ prehend that Action to be *just*, which  
 “ with full Design and Intention is applied  
 “ to the Person to whom it was due : And

B

“ therefore

“ therefore *Justice* in this Sense, will be no-  
 “ thing else, but the right Application of  
 “ the Action to the Person. We shall chuse  
 “ to divide *Justice*, chiefly with Regard to  
 “ the Matter which is owing, or which  
 “ bears a Relation to another, by way of  
 “ Debt or due.

“ But we must observe beforehand, that  
 “ some Actions may be call'd *pure*, and o-  
 “ thers *mixt*. The Former are performed,  
 “ and finished by the Motion of some of  
 “ our Powers applied in such a certain Man-  
 “ ner to the Object. Of this kind, are ho-  
 “ nouring, paying Duty and Respect, Lov-  
 “ ing, Hating, Comforting, Praising, Dis-  
 “ praising, &c. The Product of all which,  
 “ is nothing else but the causing the Object  
 “ to be really affected, or to be thought af-  
 “ fected by the Action, in a certain Way;  
 “ either with Complacency, or Dissatisfac-  
 “ tion. But the latter, or the mixt Ac-  
 “ tions, are join'd with the transferring some  
 “ Advantage, or Disadvantage on the Per-  
 “ son towards whom they are exercised;  
 “ and therefore their Effect consists princi-  
 “ pally in some Operation, either profiting  
 “ or hurting another Man in his Person, or  
 “ in his Goods. Again, there are some  
 “ *Actions* which make a Part of Commerce  
 “ amongst Men, and are valued at a cer-  
 “ tain

"tain Rate : Others have no Price or Rate  
 "imposed upon them ; concerning which  
 "Difference we shall enquire farther here-  
 "after. *Lastly*, we must take Notice, that  
 "some Things are due to us *perfectly*, o-  
 "thers *imperfectly* ; those Things which are  
 "due to us in the *former* Manner, if volun-  
 "tary Payment be not made, we may con-  
 "strain the Debtor to discharge, if we live  
 "in a natural State by Arms and main  
 "Strength : If we are Members of the same  
 "civil Society, by preferring an Action a-  
 "gainst him in Courts of Justice. But what  
 "is due to us in the *latter* Way, we ought  
 "neither to claim by Methods of Hostility,  
 "nor to extort by legal Process. It is usual  
 "for Authors to express *perfect Right*, by  
 "the Help of the Word *Suus* ; as when they  
 "say a Man claims such a Thing *suo Jure*,  
 "(by his own Right.) Now, that some  
 "Things should be thus due to us *perfectly*,  
 "and others *imperfectly*, the Reason a-  
 "mongst those who live in a State of natu-  
 "ral Liberty is, the great Diversity of Pre-  
 "cepts in Nature's Laws ; of which some  
 "conduce to the very *Being*, others only to  
 "the *well Being* of Society. And therefore,  
 "since there's less Necessity of performing  
 "these latter than the former, Reason shews,  
 "that the former may be required and ex-



" ecuted by more severe Courses and Means ;  
 " whereas in Regard to the latter, is is mere  
 " Folly to apply a Remedy more grievous  
 " than the Disease. Besides, there usually  
 " passeth between Men some covenant a-  
 " bout the *former*, but not about the *lat-*  
 " *ter* : And consequently since they are left  
 " to every Man's Conscience and Modesty,  
 " it would be very improper to extort them  
 " violently from another, unless in Cases of  
 " extraordinary Necessity. In civil Com-  
 " munities, this Difference ariseth from the  
 " particular Laws and Constitutions, allow-  
 " ing or disallowing an Action in such or  
 " such Cases ; though most Commonwealths  
 " do in these Points, follow the Tract of  
 " the *Law of Nature*, except where they  
 " have some particular Reasons advising the  
 " Contrary. When, then, we exhibit to  
 " another either Actions or Things due to  
 " him only by imperfect Right ; or when  
 " we exercise towards another Actions not  
 " coming under the Head of strict Com-  
 " merce, we are said to have observed *gene-*  
 " *ral* or *universal Justice*. As when a Man  
 " supplies another with his Counsel, Goods,  
 " or Help, as he hath need ; or when he  
 " performs the Offices of Piety, Reverence,  
 " Gratitude, Humanity, or Beneficence to-  
 " wards those to whom he is in duty bound  
 " to pay them ; this kind of Justice only  
 " enjoys

“ enjoys that the Debt be paid, not confi-  
 “ dering whether the Thing given in Pay-  
 “ ment be equal to the Reason why it is due  
 “ or not. Thus a Man sufficiently discharg-  
 “ eth the Duty of Gratitude, if he make all  
 “ the Return that his Abilities will allow ;  
 “ though perhaps the Kindness he hath re-  
 “ ceived were in Value much greater. But  
 “ when we perform towards another Ac-  
 “ tions falling under Commerce, or such as  
 “ transfer any thing on another, to which  
 “ we had a *perfect Right*, this is called *par-*  
 “ *ticular Justice*.

“ Now this *perfect Right* accrues either  
 “ to single Persons by a Covenant (tacit, or  
 “ expreis) made with some Society, in or-  
 “ der to their being admitted Members of  
 “ it, or to a Society by a Covenant made  
 “ with single Persons in order to the re-  
 “ ceiving them into the same Commu-  
 “ nity: or lastly, from Pacts made be-  
 “ tween any Parties concerning Things or  
 “ Actions falling under Commerce. When  
 “ we pay those things which are due upon  
 “ the Pact of a Society with a Member,  
 “ or of a Member with a Society, upon the  
 “ Accounts just now specified, we are said to  
 “ exercise *Distributive Justice*. For whenever  
 “ a Man is received into a Society, a Pact is  
 “ either expreisly, or at least tacitly made  
 “ between the Society and the Member now  
 “ to

“ to be introduced; by which the Society  
 “ engageth to give him a just Share and  
 “ Proportion of the Goods, which it enjoys  
 “ as a common Body: And the Member  
 “ promiseth that he will bear his proper and  
 “ equal Part of those Burthens which con-  
 “ duce to the Preservation of the Society,  
 “ considered as such. The exact Determi-  
 “ nation of the proper Share of Goods to be  
 “ assigned to the Member, is made accord-  
 “ ing to the Rule and Value of the Pains or  
 “ Charges employed by him, towards pre-  
 “ serving the common Society, in proportion  
 “ to the Pains or Charges contributed by the  
 “ other Members: On the other hand, the  
 “ Determination of the proper Share of Bur-  
 “ thens to be laid on the Member, is made  
 “ according to the Value of the Benefits re-  
 “ ceived by him from the Society, confi-  
 “ dered in Proportion to the Advantages  
 “ which the rest of the Members enjoy.  
 “ Hence, since it generally happens that one  
 “ Member contributes more towards the Pre-  
 “ servation of the Society than another, and  
 “ that one likewise exceeds another in deriv-  
 “ ing Advantage from it, the Reason is ve-  
 “ ry apparent why, upon the Supposal of  
 “ many Persons, and of this Inequality a-  
 “ mongst them, we ought in the Exercise of  
 “ *Distributive Justice*, to observe a compara-  
 “ tive or Equality, which consists in this,  
 “ that



“ that what Proportion the Merits of one  
 “ Person bear to the Merits of another, such  
 “ Proportion shall his Reward bear to the  
 “ other’s Reward. Thus, for Instance, if  
 “ six Things of the same Value are to be di-  
 “ stributed amongst *Caius*, *Seius*, and *Titius*,  
 “ upon Supposition that *Titius* exceeds *Caius*  
 “ in a triple Proportion, and *Seius* in a dou-  
 “ ble; *Titius* shall have three, *Seius* two,  
 “ and *Caius* one. Nor is it requisite to this  
 “ Equality, that the Reward fully answer  
 “ and come up to the Merits of the Person ;  
 “ but ’tis sufficient that what Proportion the  
 “ Service of the one bears to the Service of  
 “ the other, the same Proportion there should  
 “ be between their Shares of the common  
 “ Benefits ; and the same Rule must be fol-  
 “ lowed in distributing Burthens. As for  
 “ what Mr. *Hobbes* alledgeth to overthrow  
 “ this respective Equality ; that I may of my  
 “ own Goods, distribute *least* to him that de-  
 “ serves *most*, and *most* to him that deserves  
 “ *least*, provided, I pay what I bargained for ;  
 “ and useth the Authority of our Saviour in  
 “ the 20th of St. *Matthew*, to confirm his  
 “ Opinion. All this, if rightly considered,  
 “ makes nothing to the Purpose ; for in the  
 “ Place of Scripture above cited, it is shewn  
 “ indeed, that he doth not offend against  
 “ *commutative Justice*, (which governs the  
 “ Contracts

“ Contracts about Hire, &c.) who out of  
 “ his Liberality gives to some a larger Re-  
 “ ward than their Service deserves ; or who,  
 “ to the Wages due upon this *commutative*  
 “ *Justice*, adds something out of free Boun-  
 “ ty, which is comprehended under *universal*  
 “ *Justice*. But how doth this affect our *Di-*  
 “ *tributive Justice* ? The Business of which,  
 “ is nothing else but to assign to many Per-  
 “ sons, their proper Shares of a Thing, to  
 “ which all of them have a *perfect*, though  
 “ (in regard to the Quantity) an *unequal*  
 “ Right. And then, as for the Word *Di-*  
 “ *tributing*, which occurs in the Instance al-  
 “ ledged from Scripture, this doth not in the  
 “ least make the Act fall under Justice, strict-  
 “ ly called *Distributive* ; but only hints that  
 “ the Labourers were many, to every one of  
 “ whom their Wages were to be paid accord-  
 “ ing to *commutative Justice*. To clear the  
 “ Doubts raised on this Head by *Grotius*, in  
 “ Book I. Ch. 1. we need only observe that  
 “ his *Expletive Justice*, doth not exactly come  
 “ up to *Commutative*; nor his *Attributive*, to  
 “ *Distributive* ; and that his Division is not  
 “ founded on the same Bottom as ours : For  
 “ ours, is chiefly taken from the *Matter* which  
 “ is owing, and from the *Cause* of owing it ;  
 “ but his, from the *Manner* and the *Degree*  
 “ in which a Thing is owed. Whence the  
 “ Reason

“ Reason is evident, why the parting of  
 “ Gain in Contracts of Societies, is by him  
 “ referred to *Expletive*, and by us to *Distributive Justice*. The observing of geometrical Proportion in these Cases, is indeed  
 “ only accidental; since 'tis not necessary,  
 “ that the Members should have contributed  
 “ unequal Shares; but they might as well  
 “ have contributed equally, and then in parting the Gains, a simple or strict Equality must have been followed. As for that Case stated by *Grotius*, if one Man only be found fit for a public Office, his Reward shall be assigned him according to simple or arithmetical Proportion: It must be farther enquired, whether the Man hath a perfect, or an imperfect Right to this Office? If the latter, then the Case will belong to *universal Justice*; if the former we agree to *Grotius's* Remark, that the Species of Proportion called geometrical is, though generally, yet not always followed in *Distributive Justice*. Nor have we taken the Difference of our two Kinds of Justice from their making Use of a different Proportion. And so for the other Instances of *Grotius*, the assigning of Legacies belongs not to *Distributive Justice*, but to *universal*: And when a City or State repays out of the common Stock, what some particular Members have expended on the public Account, *Commutative Justice* is exercised



“ exercised, and not *Distributive*; because the  
 “ Reason of the Debt ariseth not from that  
 “ Pact by which the Society first admitted  
 “ the said Members, but from a particular  
 “ and a very different Contract.”

A grave Author (*a*) asks, “ how shall those  
 “ be unfeignedly just, whose Religion doth  
 “ not cause to be so? Or they religious which  
 “ are not found such by the Proof of their  
 “ just Actions? If they who employ their  
 “ Labour and Travail about the public Admi-  
 “ nistration of Justice, follow it only as a  
 “ Trade with unquenchable and uncon-  
 “ scionable Thirst of Gain; being not in  
 “ Heart persuaded, that Justice is God’s own  
 “ Word, and themselves his Agents in this  
 “ Business; the Sentence of Right, God’s  
 “ own Verdict, and themselves his Priests to  
 “ deliver it; Formalities of Justice do but  
 “ serve to smother, and that which was ne-  
 “ cessarily ordained for the common *Good* is  
 “ through shameful Abuse made the Cause  
 “ of common *Misery*. The same Piety,  
 “ which maketh thole that are in Authority  
 “ careful to please, and resemble God by Ju-  
 “ stice, inflameth every Man of Action with  
 “ Zeal to do good (as far as their Place will  
 “ permit) unto all. For that they know is  
 “ most noble and divine.”

(*a*) *Hooker’s Eccles. Polity*, p. 185.

*Sydney*

Sydney saith (a) (speaking of Kings) " they  
 " are under the Law, and the Law is not  
 " under them ; their Letters or Commands  
 " are not to be regarded. In the Admini-  
 " stration of Justice, the Question is not  
 " what pleaseth them, but what the Law  
 " declares to be right, which must have its  
 " Course, whether the King be busy or at  
 " Leisure, whether he will or not. The  
 " King (b) who never dies, is always present  
 " in the supream Courts, and neither knows,  
 " nor regards the Pleasure of the Man that  
 " wears the Crown."

Bracton observes, the King therefore ought  
 to exercise the Power of the Law, as becomes  
 God's Vicar and Minister on Earth, because  
 he alone is God's Vicegerent. But the Power  
 of doing Injustice belongs to the Devil, and  
 is not of God ; and either of which Powers  
 a King administers, it is from thence he ma-  
 nifests whose Servant he is. Therefore, so  
 long as he does Justice, he is God's Creature,  
 but commences the Devil's Agent, when he  
 inclines to do Injustice. *Exercere igitur de-  
 bet Rex potestatem juris sicut Dei vicarius &  
 minister in terra, quia illa potestas solius Dei  
 est, potestas autem injuriæ Diaboli, est non  
 Dei ; & cujus horum opera fecerit Rex, ejus  
 minister erit : igitur dum facit justitiam, vi-*

(a) Sydney on Government, p. 283.

(b) Viz. God.

*carius est regis æterni : Minister autem Diaboli dum declinet ad injuriam.* Bracton *de Leg. Ang. Lib. 3.*

Mr. Locke (a) says, “ great Care should  
 “ be taken that Children transgress not the  
 “ Rules of Justice; and whenever they do,  
 “ they should be set right, and if there be  
 “ Occasion for it severely rebuked; our  
 “ first Actions being guided more by Self-  
 “ love, than Reason or Reflection; ’tis no  
 “ Wonder that in Children they should be  
 “ very apt to deviate from the just Measures  
 “ of Right and Wrong; which are in the  
 “ Mind the Result of improved Reason, and  
 “ serious Meditation. This, the more they  
 “ are apt to mistake, the more careful  
 “ Guard ought to be kept over them; and  
 “ every the least Slip in this great social Vir-  
 “ tue taken Notice of, and rectified: And  
 “ that in Things of the least Weight and  
 “ Moment, both to instruct their Ignorance  
 “ and prevent ill Habits; which from small  
 “ Beginnings in Pins and Cherry-Stones,  
 “ will, if let alone, grow up to higher Frauds,  
 “ and be in danger to end at last in down-  
 “ right hardened Dishonesty. The first Ten-  
 “ dency to any *Injustice* that appears, must  
 “ be suppressed with a Shew of Wonder and  
 “ Abhorrency in the Parents and Gover-  
 “ nors: But because Children cannot well

(a) Of Education, p. 47. Folio, Vol. 3.

“ com-



“ comprehend what *Injustice* is, till they un-  
 “ derstand Property, and how particular  
 “ Persons come by it, the safest way to se-  
 “ cure *Honesty*, is to lay the Foundations of  
 “ it early in *Liberality*, and an Easiness to  
 “ part with to others, whatever they have,  
 “ and like, themselves. This may be taught  
 “ them early, before they have Language  
 “ and Understanding enough to form di-  
 “ stinct Notions of Property, and to know  
 “ what is theirs by a peculiar Right, exclu-  
 “ sive of others. And since Children sel-  
 “ dom have any thing but by Gift, and that  
 “ for the most Part from their Parents, they  
 “ may at first be taught, not to take or  
 “ keep any Thing, but what is given them  
 “ by those whom they take to have a Power  
 “ over it: And as their Capacities enlarge,  
 “ other Rules and Cases of Justice and Right,  
 “ concerning *Meum* and *Tuum*, may be pro-  
 “ posed and inculcated.”

And elsewhere (a), this excellent Person  
 observes, what *Adam* fell from, is visible  
 was the State of *perfect Obedience*, which is  
 called *Justice* in the *New Testament*, though  
 the Word which in the original signifies *Ju-*  
*stice* be translated *Righteousness*.

Lord *Shaftsbury* (b) allows, “ there is  
 “ *just*, and *unjust*; and belonging to it a na-

(a) Reasonab. of Christ. Vol. II. p. 475, Folio.

(b) Characterist. Vol. II. p. 420.

" tural Presumption or Anticipation, on  
 " which Resentment or Anger is founded.  
 " For what else should make the wicked-  
 " est of Mankind often prefer the Interest  
 " of their Revenge to all other Interests,  
 " and even to Life itself; except only a  
 " *Sense of wrong*, natural to all Men, and  
 " *a Desire to prosecute that Wrong* at any  
 " Rate? Not for their own Sakes, since  
 " they sacrifice their very Being to it; but  
 " out of Hatred to *the imagined Wrong*, and  
 " for a certain Love of *Justice*, which even  
 " by *unjust* Men is by this Example shewn  
 " to be beyond the Love of Life itself."

My Lord Bacon (*a*) saith, " in Causes  
 " of Life and Death, Judges ought (as far  
 " as the Law permitteth) in Justice to re-  
 " member Mercy, and to cast a severe Eye  
 " on the Example, but a merciful Eye on  
 " the Person." For this Cause I suppose  
*Joseph* in the *Holy Scripture*, is called a just  
 Man, in that he had Compassion on the ima-  
 ginary Sin of the *Virgin Mary*, and deter-  
 mined to put her away privately, when he  
 first perceived her to be with Child.

The like Mercy was exercised by our  
 blessed Lord to the adulterous Woman;  
 whom he would not suffer to be put to  
 Death as the Law required; herein casting

(*a*) *Essays Civil and Moral*, Vol. 3. p. 377.

a severe Eye on the Example, and having Compassion on the Criminal.

*Tully (a)* says, that every Reproof and Chastisement should be always free from contumelious Language, and not inflicted for the Sake of Chastising the Delinquent; but for the good and Advantage of the whole State. 'Tis not the Prisoner, but the Crime that is to be pursued, the Crime primarily, the offended but by Consequence, and therefore such Courses must be taken as discover that, and not such as insnare him. *Duty of Juries*, p. 97, 1682. The Judges in *Rome*, when they pronounced Judgment in capital Cases, always changed their Robes of Office, this was called *prætextum ponebant*, and put on a Gown of less State, and mournful, *perversa vestris induenda*, to evidence the great Reluctance, with which the Law and the Magistrates shed the Blood of a Fellow-Creature: For Instances of this see *Seneca de Ira*, Lib. 1. 16. Also *Val. Max.* Lib. 9. 12. Also *Lavaur in Trimalcios Feast*. Vol. 2. p. 274. note 1st.—Nay so very tender were they of touching Life, that as *Polybius* records, they had one Custom peculiar to themselves, which he says is memorable and worthy of Praise, for those (says he) that are accused of a capital Crime have the Liberty, whilst the Process is preparing, to

(a) *De Off.* Lib. 1. C. 25.



withdraw themselves in the Face of the World, and enter into voluntary Banishment, although even the Tribunes were met to judge the Business, provided only one of them had given his Vote, where at any of the Cities in Alliance with the *Romans*, they might dwell in Safety : *Vide Polybius*, Lib 6. It's well known, that his present Majesty *George* the II<sup>d</sup>. can never be induced to sign a dead Warrant, without having the greatest Reluctancy, and even after frequent Applications, a Circumstance whereby he more truly deserves the Name of Great, then did either *Alexander* or *Cæsar* : For Mercy is the favourite Attribute of God : whereas Tyrants and Villains, are ever Blood-thirsty and cruel.

*Lucian*, speaking of *Demonax*, says, he detested Vice, but not the Person that laboured with it, and applied himself to remedying it, as Physicians do a Distemper, without storming at their Patients : He knew Flesh and Blood was frail, and that it was the Part of good Men to help and forgive them that Erred (a).

“ *Justice of Actions*, is by Writers,” (saith  
 “ *Hobbes* (b) divided into *Commutative* and  
 “ *Distributive* ; and the former they say  
 “ consisteth in *arithmetical Proportion* ; and  
 “ the latter in *Proportion geometrical*. Com-

(a) *Lucian's Demonax*.

(b) *Leviathan*, p. 75.

“ *mutative*

“ *mutative*, therefore they place in the Equa-  
 “ lity of Value of the Things contracted for :  
 “ And *Distributive*, in the Distribution of  
 “ equal Benefit, to Men of equal Merit.  
 “ As if it were Injustice to sell dearer than  
 “ we buy, or to give more to a Man than  
 “ he merits. The Value of all Things con-  
 “ tracted for is measured by the Appetite  
 “ of the Contractors ; and therefore the just  
 “ Value is that which they have contracted  
 “ to give : And Merit (besides that which  
 “ is by Covenant, where the Performance  
 “ of one Part, meriteth the Performance of  
 “ the other Part, and falls under *Justice*  
 “ *Commutative*) is not due by *Justice*, but  
 “ is rewarded of *Grace* only. And there-  
 “ fore this Distinction in the Sense it is used  
 “ to be compounded is not right. To speak  
 “ properly *Commutative Justice* is the Ju-  
 “ stice of a *Contractor* ; *that is*, a Perfor-  
 “ mance of a Covenant in buying and sell-  
 “ ing, hiring, and letting to hire, lending  
 “ and borrowing, exchanging, bartering,  
 “ and other Acts of Contract. And *Distri-*  
 “ *butive Justice*, the Justice of an *Arbitra-*  
 “ *tor* ; *that is to say*, the Act of defining  
 “ what is *just*, (being trusted by them that  
 “ make him *Arbitrator*) if he perform his  
 “ Trust, he is said to distribute to every  
 “ Man his own : And this is indeed just  
 “ Distribution, and may be called (though  
 “ improperly) *Distributive Justice* ; but  
 D “ more

“ more properly *Equity*, which also is a Law  
“ of Nature.”

LORD BACON, in his *Advancement of Learning* (a), examples thus, *Si inæqualibus æqualia addat ; omnia sunt inæqualia* (b), as a Rule in Mathematicks : And the same holds in the Ethicks concerning *Attributive Justice*. For in *Justice Expletive*, the Reason of Equity requires that equal Portion be given to unequal Persons : But in *Attributive*, unless unequal be distributed to unequal, it is great Injustice.

PLUTARCH says of all *Aristides's* (c) Virtues, the best known, and that by which he was most distinguished was his *Justice* ; as being of the most constant Use, and of the greatest Extent. Hence from being a Person of mean Birth and Fortune, he acquired the most royal and divine Sur-name or Appellation of *Just* ; a Title Kings and Tyrants were never fond of : They rather chose to be stiled *Poliorectes*, i. e. *Takers of Towns* ; *Cerauni*, *Thunderbolts* ; *Nicanors*, *Conquerors* ; nay, some have affected the additional Titles of *Eagles* and *Vultures*, preferring such vain-glorious Names, which imply nothing but Force and Violence, as a more substantial Honour, than those that denote real Virtue. Whereas the *Deity* it-

(a) *Lib. 3. p. 84.*

(b) *Euclid. El. Lib. 1.*

(c) *Vit. Aristi.*



self, to whom they are fond of being likened and compared, seems to be distinguished only by three Things, *Immortality*, *Power*, and *Virtue*; of which *Virtue* is out of dispute the most respectable and divine. For a Vacuum and the Elements partake of *Immortality*; Earthquakes, Thunder, Whirlwinds, and Innundations possess an almost infinite *Power*; but as for *Justice*, nothing participates of that, but what is capable of reasoning, and knowing the *divine Essence*. And whereas Men are possessed with different Sentiments, with Regard to the Gods, as of Wonder and Envy, of Fear and Dread, or of Love and Esteem: They seem to admire and think them happy, by Reason of their being exempted from Death and Corruption; to fear them on Account of their Power and Empire over the Earth, and to love, honour, and reverence them for their *Justice*. Yet being thus affected towards the Deity in three different Ways, they still covet only the two first of these Properties, (*viz.*) *Immortality*, of which our Nature is incapable (*a*); and *Power*, the greatest Part

(*a*) I would not be thought here to contradict, or deny the Resurrection of the Body, according to the Christian Scheme; nor indeed does *Plutarch's* Words in the least gainsay it. For the Body we are to rise with, is not this corruptible one of Flesh and Blood; which cannot inherit the Kingdom of *Heaven*, but a changed, glorious, incorruptible Body.

of which depends on Fortune; postponing, and neglecting *Virtue*, the sole divine Good we can attain to: And therein they are greatly mistaken, not considering, that “ *Justice* makes the Life of such as enjoy “ Prosperity, Power, and Authority, all “ heavenly and divine; whereas *Injustice* “ makes them lead the Life of a Beast.”

And elsewhere (a) he ascertains, “ there “ is no Virtue more commendable and popular in a Prince than *Justice*.” Which made *Timotheus* say, that *Mars* is a great Tyrant; but *Law*, according to the incomparable *Pindar*, is the most glorious Queen of the Universe. And upon this Subject *Homer*, the Prince of Poets, observes, that *Jupiter* did not bestow upon Kings terrible Engines and Ships of War, for the Destruction of Cities; but had committed the Oracles of *Law* and *Justice* to their Custody, in order to their good Government and Preservation; and that the most *just* Princes, and not the most *fierce* and *violent*, were they who were honoured with the glorious Title of his Friends, and Disciples. So firm a Stickler for *Justice* was this learned Heathen; and which he thinks should not be violated, save in one Case (b) only (*viz.*) *for the Sake of Empire*. But *Grotius*, with

(a) Plut. Vit. Demet.

(b) See the Comparison of the Life of *Grassus* and *Nicias*.

far better Reason, concludes, that the Subject of a War, abates, or raises the Courage of the Soldiers; and that, " whoever takes  
 " up Arms (a) unjustly seldom returns from  
 " Battle safe and sound, and that Hope  
 " is the faithful Companion of a good  
 " Cause. - Nor, says he, does any one  
 " choose to ally himself with Men, who  
 " pay no Regard to Truth, Justice, or E-  
 " quity."

*Aristotle* defines that to be a *just Action*,  
 " which keeps the Middle betwixt doing  
 " and receiving an Injury, for he that does a  
 " Wrong has more than he should have :  
 " And on the other Hand, he that receives  
 " the Wrong, has less than falls to his Share.  
 " *Justice*, is a Mediocrity, but not in the  
 " same Manner as the other Virtues of which  
 " we have spoken above; *Virtue* has solely  
 " in view the *Middle*, and *Injustice* only in-  
 " closes the *two Extrems*. *Justice*, has in  
 " it a Disposition to embrace *Right*, after  
 " Choice, and Deliberation; and to render to  
 " every one his Due, whether it be in trans-  
 " acting one's own Affairs with others, or  
 " transacting the Affairs for others, in such  
 " a Manner, as neither to allot to one's self  
 " more of the agreeable or advantageous, or  
 " even less of the disagreeable and hurtful,  
 " at the same Time we give less of the for-

(a) Preliminary Discourse de Jur. Bell. et Pac.



“mer and more of the latter to others: But  
 “that we observe an equal Distribution to  
 “one’s self, and other Persons. *Injustice*,  
 “on the other hand, is a Disposition to do  
 “*wrong* deliberately; that is, to act in such  
 “a Manner as to give to every one too much,  
 “or too little of Advantages, or Disadvan-  
 “tages, without holding the Rule of Pro-  
 “portion. And therefore, there is even De-  
 “fects and Excess in *Injustice*, in Proportion  
 “as it leaves too much, or too little: For  
 “an unjust Man, when he acts for *himself*,  
 “allots too much of what is purely and sim-  
 “ply good, and too little of what is disad-  
 “vantageous to himself; and if he acts for  
 “*others*, he in general uses the same. With  
 “regard therefore to *unjust Actions*, the ex-  
 “tream Viciousness is on one hand to re-  
 “ceive a Wrong, and on the other to do  
 “one (a).”

Grotius (b) observes, that *Justice* would  
 not be entirely without Effect, even were it  
 not supported by Force: For the Observa-  
 tion of *Justice*, says he, puts the Conscience  
 at quiet; whereas *Injustice* produces in the  
 Hearts of those who practise it the most cruel  
 Remorse: Such as that *Plato* paints Tyrants  
 to be scourged with. All honest People ap-  
 plaud *Justice* and blame *Injustice*: But what

(a) *Ethic. Nicomach.* Lib. V. C. 9.

(b) Prelim. Discourse, Sect. 21.

is still more important God hates *Injustice*, whereas *Justice* is the Object of his Love and Favour.

“ It is Time for us, says an antient Author, (a) to enter the *Temple of Justice*,  
 “ where, whichever Way we turn, we behold an Infinity of honest and religious  
 “ Examples ; where Truth is truly studied,  
 “ where Lust gives Place to Reason, and  
 “ where nothing seems profitable, but what  
 “ at the same Time is honest ; and where  
 “ Rome gives Examples to the Rest of the  
 “ World.

*Quantum mutata ab illá ?*

*Hierocles*, in his Comment on the golden and divine Verses by Pythagoras (or whoever was the Author of those Verses) take Notice, that he who truly respects himself, will stand upon his Guard against any Vice ; and observes, that of Vices there be several Kinds ; in the rational Part, *Imprudence* ; in the irascible, *Timorousness* ; in the concupiscible, *Luxury* and *Covetousness* ; and throughout all the Faculties, *Injustice*. To the Avoidance therefore of these Evils, he opposes four Virtues : *Prudence*, in the rational Part : *Courage*, in the irascible ; *Temperance*, in the concupiscible ; and lastly *Justice*, which is conversant

(a) *Val. Max. Lib. VI. Ch. 5.*

about all the Faculties, as being the most perfect, and comprizing all other Virtues in itself. For which Reason, it is first of all mentioned in the Verses; and next Prudence, together with the bad Designs and Undertakings, which take their Rise from it, and end in compleat and perfect *Justice*. For he that uses right Reason, has Courage for his Fellow-Soldier in Hardships; Temperance in Things pleasant; and in all Things *Justice*. So that in some, Prudence will be found to be the Beginning of all Virtues, Justice the End, and Courage and Temperance the Middle. For that Faculty which ponderates and considers all Things, and searches out that which is right in every Action, so as all may be rationally disposed, has obtained the Habit of Prudence, which is the choicest Disposition of our rational Nature, and does greatly adorn the other Faculties: So that Anger becomes Courage; Lust Temperance; and Justice swerves nothing from Reason; and while thus our mortal Man is adorned, it is through the Surplusage of Virtue, which is in the immortal Man. For the Virtues first shine out from the Mind upon the rational Soul, of that they are the proper Form, Perfection, and Happiness. But upon the brutal Part and mortal Body there shines a reflected Ray of Virtue, that what is united to the rational Nature, may be replenished with Beauty and Measure. But the chief of all  
divine



divine Good is Prudence, which, when well implanted in the Soul, helps us to advise well in all Matters ; to bear Death with Courage, and Loss of our Goods with Mildness and Decency. For Prudence is able to bear all Changes of this mortal Life, and of Fortune, which is appendant to it, soberly and undauntedly. For she considers the Nature of Things, and knows that what is compounded of Water and Earth must of Necessity be reduced to them again. Neither is she exasperated against Necessity, or surprised at what befalls us as extraordinary, that which is mortal must die. She knows *it is appointed to all Men once to die*, and that there is a certain definitive Time for the Duration of these mortal Bodies: Which when come, we should not fret at it, but cheerfully submit to it as the Law of God. For the Office of Prudence, is to follow the best Counsels; not to seek to escape dying, but to aim at dying well: For she says, "*exercise Justice in Deed and Word*;" you will never then blaspheme upon the Loss of Riches, or in the Pains of Disease, lest you should violate *Justice* in your *Words*; neither will you invade the Goods of your Neighbour, or contrive Mischief against his Person, lest you commit Injustice in *Deed*. For if *Justice* has once the Guard of our Souls, we shall well discharge our Duties to God, to our Neighbours, and to ourselves.

E

I shall

I shall apply the above Instances to the Consideration of such who fall into the unjust Humour of being determined at all Rates, whether just or unjust, fit or unfit, cruel or humane, to keep up what they call their *Family-Name*, a cant Term, for the most Part, and which oftentimes has no more to do with the Property of the Thing intended, than Softness has to Iron, or Lightness to Lead. It is owing in general to the fond Determination of Man, that *his Lands shall be called after his Name for ever*. But says God, *you perish like the Beasts of the Field, and your Name shall be clean cut off*.

*The Law  
knows no  
Names.*

The Law indeed knows no Names, nor in a Matter of Descent, does it one Jot consider the Name of the next Heir (*a*), for she, or her Issue who is descended from the eldest Brother, is preferable to the bare Name of a younger Brother, or his Sons. And this was and is now the Case of descent of all the antient Baronies of the Realm, and

(*a*) Amongst the *Romans* Parties took the Name of the Family they were of, either by Father or Mother, according to the Lustre of the Race. Thus all the Emperors from *Julius Cæsar*, to *Nero*, bore his Name, although every one of them had different paternal Names. There is in *Tacitus* a strong Proof of this in the Story he tells of the Daughter of *Titus Olius*, who, on the Account of the great Lustre of her Mother's Family, bore the Name of *Sabina Popæa* as Grand-daughter of *Popæius Sabinus*, a Lady, who he says derived great Wealth from her Parents, and Beauty and a glorious Descent from her Mother. *Ann. Lib. 13. p. 197.*

is also the Case in all Land-claims, where no particular Settlement has provided, that they shall run contrary to the Course of Nature, and the known and antient Laws of the Land. Nay it is also the Case in supreme Matters, as in the Descent of the Crown, for which Reason our Crown has been in more Sur-names, or at least as many as any other great Estate has, perhaps, since the Conquest.

The Law indeed considers Names so far, *How far the Law considers Names.* as that every one should be called and known by one, so that every Man shall be a plain simple Idea. But the Law does not favour or have Regard to any Names whatever, but where the Name co-operates with the Blood (a).

In Matters of descent, how far God considers Names and Female Right, does most evidently appear from the 27th Chapter of *Numbers*, where the Daughters of *Zelophebad*, Ladies of great Quality in *Judea*, applied to *Moses*, to know why, because their Father left no Son, they shall lose their Name, Inheritance and Land? And after the Prophet had brought their Cause before the Lord, it was by God himself determined in Favour of Female Right in the eldest Line, by his denouncing that these Daughters of *Zelophebad* shall neither lose their Name or

(a) See *Coke of Fee Simpl.*, Lib. i. p. 14.



Inheritance, but be in all Respects on the Footing of their Father's Brethren. *And if a Man die without Issue you shall give his Inheritance to his next of his Kin.* So that who can deny, that God (who is without Error) does allow and determine a Family to be as much kept up by Females, as by Males, in a more distant Remove of Affinity of Blood? And doth also shew the Rule that should be observed with Regard to the Disposition of Inheritance. However, I do not deny, but that the *Jews* seem to have had a Right of making Wills in particular Cases, from the 21<sup>st</sup> Chapter of *Deuteronomy*, Ver. 16. And also from *Ecclesiasticus* 33, Ver. 23. But the first of these Cases, is to caution a Man against the Persuasions of a second Wife, in favour of her Children: And the latter, seems merely to regard what a Man had gathered from his own proper Industry.

*Puffendorf* (a), observes that the regular Course of *natural Inclination* is, that we should labour to make the most plentiful Provision for those that descend from our own Body, and next to these, for the next who are allied to us in Blood. For Consanguinity, commonly unites and engages Men's Minds in a particular Affection. And almost all Persons have this Desire implanted, that they especially wish well to their own

(a) Law of Nature and Nat. Lib. 4. Cap. 20.

Families, and would have them succeed and flourish as much as possible. Whether Testaments (a) had their original to Natural, or to positive Law is disputed amongst the learned? The Meaning of which Question is, not whether a Man be obliged by the Law of Nature to make a Will (for that certainly is in any Man's Choice, unless so far as it proves necessary to prevent Quarrels amongst his Relations) but whether after Property hath been once introduced, it necessarily follows from the Nature of that Establishment, that a Man may effectually dispose of his Goods by Will; or whether this Power be granted to Proprietors by positive Constitution? *Grotius's* Judgment in that Case is, " that a Testament, as many other Acts " may, does indeed receive a particular Form " from civil Ordinances; yet the Essence " and Substance of it is nearly allied to Property, and upon Supposition of Property, " belongs to the Law of Nature." Or that the Power of disposing effectually what we possess, is derived from the Law of Nations: Which the Civilians term *Jus primarium*, the first or principal Law; but the Restraint which lies upon us, to dispose of them only after such a certain Manner is owing to civil Appointment. In Regard to which Assertion it is not improbable, but that some

(a) Ibid. Lib. 4. C. 20.

Scruple may arise; for since the Things over which Property was first established, are designed only to serve the Uses of Men in this Life; and since the Dead lose all their Title to worldly Possessions, it seems not altogether so needful, that Property should contain in it a Power of ordering what should become of a Man's Things after his Death: But it might have been sufficient to have allowed every Person the command of his Goods during Life, disabling him to extend it further, and to have left to the Care of the Living the Management of what belonged to the Dead, who are no longer Members of human Society. Farther, since Death removes Men from all Concerns below, it seemed that the Dispositions and Declarations made in their Life-time, might be afterwards neglected with Impunity,

*Id Cinerem, & Manes credis Curare Sepultos?*  
*Think you that Ghosts and Ashes want a Tomb?*

An Evidence of this seems to be that the most antient Men we read of in Story, were wont to engage their Friends by Oath to fulfil their last (a) Commands; as if no human

(a) In the Will of *Hercules*, and in that of *Alceſta*, there is no absolute Bequest of Goods, but only Recommendations and certain Things they wish done. But in the *Alceſta* of *Euripides*, there is a Sort of testamentary Gift, not made indeed by *Alceſta* but by *Hercules*, Ver.



man Bond, were strong enough to oblige them in this Case. Therefore it was at the Pleasure of the Survivors, whether or no a Man's Will should take Effect, even after his Death; and consequently, they were to determine by some Agreement amongst themselves, how far they should comply with the Desires of those who had now lost the common Rights of Men. Without such Appointment, any precedent Disposal would have been vain and useless; which the Author could not, and others who could, would not maintain and put into Execution. But on the contrary it manifestly appears, that it was not sufficient in order to the Peace of human Society, to introduce such a Property or Dominion of Things, as should turn only to the present momentary Use; but it was necessary to make it such as should hold good hereafter. Man, so far as Nature allows, having no less a Right to preserve for the Future, and to provide Means towards obtaining that End, than for the present Moment. To which if we add, that we are enjoined to take a particular Care of those who are allied to us in Blood, whose Race we wish may continue to an indefinite Extent

1020. and in the Sequel our Author has made use of this Example in his *Florum sparsie ad Justinian*, p. 36. Edit. *Amst.* and from hence perhaps it happens, that he has confounded these two Persons. *Barb. Not. 4. on 2d Lib. Cap. 6. of Grot. de Jur. Bell. et Pace.*

of

of Ages, it will on the whole appear to have been conducive to the Peace of Mankind, not to make the Force of Property depend on any period of Time; since this would have created no less Confusion and Trouble than the primitive Community: But to assert it, as it were an indefinite Duration, by Means of which it might pass down and be continued to others. Now as to those who live in a State of natural Freedom, in order to preserve and continue this Property, they appoint Means according to their own Judgment.

*Of Wills  
and Testa-  
ments.*

BUT in civil Governments as it is supported by the public Strength, so it hath been variously tempered and retrenched (*a*), as particular Persons have at any Time thought to be their Interest.

And for the Claim of Children born in Concubinage, they shall claim no more than necessary Maintenance, or at least should be excluded from the main Inheritance (*b*). By

(*a*) In the 5th Book of Justinian's Code *subtit. de Secund. Nup.* is mentioned the Order of the Emperor Leo, which forbids a Woman leaving to her second Husband, more than to one of the Children of the first Marriage. Upon this Plan, the famous Chancellor of France, *Mon. de L'Hospital*, in the Time of Francis the second, published an Edict which gave a Check to second Marriages, by confining the Power of the Woman, and not suffering her to give to her second Husband more than to one of the Children by the first Marriage. *Thevet. Elog. Tom. 7. p. 374.*

(*b*) *Law of Nature and Nations, Lib. 4. C. 11. al. fo Grot. Dict. loc. Sect. 8. sub. fin.*

*the*

*the Law of the twelve (a) Tables, Tab. 5. Law 2. If a Man die, and has no Children to succeed him, let his nearest Relations be his Heir; but if he has no near Relation, let a Man of his own NAME be his Heir. The Romans, indeed had such an Abhorrence to disinheriting Parties, that they termed it confounding the natural Order of Testaments by a turbulent Mind (b). And Valerius Maximus's 7th Chapter of his 7th Book, is filled with Examples of the Romans cancelling unnatural Wills.*

*Pliny, in his Panegyrick (c) on Trajan, the Emperor, amongst other good Feats of that Prince, mentions a Tax that had been laid on Wills by a former Emperor; which Tax was light and easy for Strangers to pay, who came into others Estates: But was very grievous to such who came by their Goods by Right of Descent. Therefore, says he, the Tax was continued on Aliens, but abolished with Regard to others; for one very*

*(a) See Father Catrou and Rouille's Collection of the Laws of the twelve Tables.*

*(b) Testamenti ordinem Violenta animo confundis. Val. Max. Lib. 7. Cap. 7. Exam. 4.*

*(c) Illis irrogatum est, his remissum; videlicet quod manifestum erat, quanto cum dolore laturi, seu potius non laturi homines essent, distringi aliquid, & abradi bonis, quæ sanguine, gentilitate, sacrorum denique societate, meruissent, quæque nunquam ut aliena & sperando, sat ut sua semperque possessa, ac deinceps proximo cuique, transmittenda, cepissent Edit. Com. Coardi de Quart, p. 141.*



plainly sees what pain a true Heir suffers, or rather a true Heir will never suffer a right belonging to his Blood, or Alliance to be snatch'd from him, and which he does not take as a casual or foreign Gift, but as his proper Goods derived to him by right from his Ancestors, and which he intends to transmit to his Posterity. For which cause, it is probable that *Tiberius* the Emperor never would take any Benefit of a Will that was made in his favour by a Stranger, or in Spite, or Hate, or Prejudice to others (a).

The disinheriting a right Heir, therefore naturally implies the putting something *wrong* in the Place of *right*, so that *prima facie*, any Work of disinheriting carries with it an Act of *Injustice*, which nothing surely can counterpoize, but a Reason superior to the Wrong that is done.

And yet it is very common to see Men who have Daughters, or other very near Relations in the Female Line, transpose without any Scruple the order, and set by their real Relation, in order to prefer some very distant Male Ally, or even sometimes no Relation at all, but a mere Pageant, and this only to satisfy a low and contemptible Vanity, of not letting that perish, which will certainly suddenly have an End: I mean

(a) *Neque hæreditatem cujusquam adiit, nisi cum amicitia meruisset. Ignotos & aliis infansos, eoque principem nuncupantes, procul arcebat. C. Tacit. Ann. Lib. 2. p. 51.*  
that

that simple found a *Name*. I would with a certain Author (a) advise such Men to consider, "that all *natural Relation* is laid in Marriage: For the Husband and Wife have solemnly attached themselves to one another, "having the same *Children, Interests, &c.* "become so intimately related as to be "reckoned united *one Flesh*, and in the "Laws of Nations many times *one Person*. "Certainly they are such with respect to "their Posterity, who proceed from them "jointly, the Children of this Couple are "related between themselves by the Mediation of Parents, for every one of them being of the *same Blood*, with their *common Parents*, they are all of the *same Blood*, "(truly *Consanguinei*;) the Relations which they respectively bear to their Parents, meeting there, as in their *Center*. This is the nearest Relation that can be, next to those of Man and Wife, Parents and their Children, who are immediately related by Contact, or rather by Continuity of Blood, if one may speak so. The Relation between the Children of these Children, grows more *remote* and *dilute*, and in time wears out. For at every Remove the natural Tincture or Sympathy may be supposed to be weakened; if for no other Reason, yet for this. Every Remove, takes off *Half* the common Blood derived

(a) *Relig. of Nat. Delin.* p. 166,

“ from the grand Parents. For let C be  
 “ the Son of A and B, D the Son of C, E  
 “ of D, F of E : and let the *Relation* of C  
 “ to A and B be as one : then the *Relation* of  
 “ D to A and B will be but half ; because  
 “ C is but one of the Parents of D, and so  
 “ the *Relation* of D to A and B is but half  
 “ of that, which C bears to them. By  
 “ proceeding after the same manner it will  
 “ be found, that the *Relation* of E to A and  
 “ B is one quarter (or half of the half,) of F  
 “ one eighth, and so on. So that the *Re-*  
 “ *lation*, which Descendants in a direct Line  
 “ have by Blood to their grand Parents, de-  
 “ creaseth thus in a Geometrical Proportion,  
 “ the *Relation* between them of *collateral*  
 “ *Lines*, which passes and is made out  
 “ through the grand Parents, must soon be  
 “ reduced to an inconsiderable Matter.

“ If then we suppose this *Affection* or  
 “ Sympathy, when it is permitted to act re-  
 “ gularly and according to Nature, no rea-  
 “ son intervening to exalt or abate it, to o-  
 “ perate with a Strength nearly *proportion-*  
 “ *able* to the Quantity or Degree of Relation,  
 “ computed as above, we may perhaps near-  
 “ ly discern the *Degrees* of that Obligation,  
 “ which Persons related lie under to assist  
 “ each other *from this Motive*.

“ But there are many Circumstances and  
 “ Incidents in Life capable of affecting this  
 “ *Obligation*, and altering the Degrees of it :

“ A Man



" A Man must weigh the Wants of *himself*,  
 " and his own Family, against those of his  
 " *Relations* : He must consider their Sex,  
 " their Age, their Abilities, and Opportuni-  
 " ties ; how capable they are of good Offi-  
 " ces, how they will take them, what use  
 " they will make of them, and the like.  
 " He, who designs to act agreeably to *Truth*,  
 " may find many such Things demanding  
 " his Regard ; some justly moving him to  
 " Compassion, others holding back his  
 " Hand. But however this may in general  
 " be taken as evident, that *next after* our  
 " Parents and own Offspring, Nature directs  
 " us to be helpful in the *first Place* to Bro-  
 " thers and Sisters, and then to other Rela-  
 " tions according to their respective Di-  
 " stances in the Genealogy of the Family,  
 " preferably to all Foreigners. And though  
 " our Power, or Opportunities of helping  
 " them in their Wants should be but little,  
 " yet we ought to preserve our Affection to-  
 " wards them, and a Disposition to serve  
 " them, as far as we *honestly* and *prudently*  
 " can, and whenever the proper Opportu-  
 " nity shall present itself. This *Nature* and  
 " *Truth* require."

*Erasmus* (a) observes, " that Mankind are  
 " so happy in themselves, as no one, how-  
 " ever ill his Circumstances be, will either  
 " change his *Fortune*, his *Kin*, his *Dwelling*-

(a) *Moriae Encomium*, p. 51. Edit. W. Hall 1668.

" place

“ place, his *Customs* or *Country* with others.”  
 If this be the case, how unnatural a Monster is he, who supercedes all natural Affection merely for the sake of a Name!

*Hobbes* treating on *Names*, (a) says, that  
 “ whatever can enter into an account, or be  
 “ consider’d as on account is *subject to Names*;  
 “ or whatever can be added to the other to  
 “ make a Sum, as also what can be subtract-  
 “ ed one from the other, and leave a Remain-  
 “ der. The *Latins* called Accounts of Mo-  
 “ ney *Rationes*, and accounting *Ratiocinatio*;  
 “ and that which we in Bills, or Books, call  
 “ *Items*, they called *Nomina*, that is *Names*.  
 “ And thence it seems to proceed that they  
 “ extended the word *Ratio*, to the Faculty of  
 “ *reckoning* in all other things. The *Greeks*;  
 “ have but one word *λογος*, for both *Speech*  
 “ and *Reason*. Not that they thought there  
 “ was no *Speech* without *Reason*, but no  
 “ *Reasoning* without *Speech*. And the Act  
 “ of *Reasoning* they called *Syllogism*, which  
 “ signifieth summing up of the Consequences  
 “ of one saying to another. And because the  
 “ same thing may enter into Account for  
 “ divers Accidents, their Names are ( to  
 “ shew that Diversity) diversely wrested, and  
 “ diversified. This Diversity of *Names* may  
 “ be reduced to *four* general Heads.

“ *First*, a thing may enter into account  
 “ for *Matter*, as *Body*, as *Living*, *Sensible*,

(a) *Leviathan*, p. 15.

“ *Rational*,

“ *Rational, Hot, Cold, Moved, Quiet, with*  
 “ *all which Names the Word Matter or Bo-*  
 “ *dy is understood, all such being Names of*  
 “ *Matter.*

“ *Secondly, it may enter into account or*  
 “ *be considered for some Accident or Qua-*  
 “ *lity, (a) which we conceive to be in it ;*  
 “ *as for being moved, for being so long, or*  
 “ *being so hot, &c. And then of the Name*  
 “ *of the thing itself, by a little change or*  
 “ *wresting, we make a Name of that Acci-*  
 “ *dent, which we consider ; and for living*  
 “ *put into the Account Life ; for moved*  
 “ *Motion ; for hot, Heat ; for long, Length,*  
 “ *and the like. And all such Names are the*  
 “ *Names of Accidents and Properties, by*  
 “ *which one Matter or Body is distin-*  
 “ *guished from another. These are called*  
 “ *Names, Abstract, being severed (not from*  
 “ *Matter) but from the Account of Matter.*

“ *Thirdly, we bring into our Account,*  
 “ *the Properties of Bodies, whereby we*  
 “ *make such Distinction : as when any thing*  
 “ *is seen by us, we reckon not the thing it-*  
 “ *self, but the Sight, the Colour, the Idea of*  
 “ *it in the Fancy. And when any thing is*  
 “ *heard we reckon it not, but the Hearing*  
 “ *or Sound only, which is our Fancy, or*  
 “ *Conception of it by the Ear ; and such are*  
 “ *Names of Fancies.*

(a) From hence were derived the Names of *Long-*  
*Shanks, Crook-back, Hotspur, Plantagenet, &c. i. e.,*  
*from Accidents and Properties.*

“ *Fourth-*



“ *Fourthly*, we bring into *Account*, con-  
 “ sider and give *Names*, to *Names* them-  
 “ selves, and to *Speeches*: for *General*, *U-*  
 “ *niversal*, *Special*, *Equivocal*, are *Names*  
 “ of *Names*. And *Affirmation*, *Interroga-*  
 “ *tion*, *Commandment*, *Narration*, *Syllogism*,  
 “ *Sermon*, *Oration*, and many other such  
 “ are *Names* of *Speeches*. And this is all  
 “ the variety of *Names* positive; which are  
 “ put to mark somewhat which is in *Nature*,  
 “ or may be feigned by the Mind of Men,  
 “ as Bodies that are, or may be feigned to  
 “ be, or Words and Speech. There be al-  
 “ so other *Names* called *Negative*; which  
 “ are Notes to signify that a Word is not  
 “ the *Name* of the Thing in question. As  
 “ these Words, *Nothing*, *no Man*, *Infinite*,  
 “ *Indocible*, *three want four*, and the like;  
 “ which are nevertheless of use, to reckon,  
 “ or in correcting of Reckoning; and call to  
 “ mind our past Cogitations, tho’ they be  
 “ not means of any thing; because they  
 “ make us refuse to admit of *Names* not  
 “ rightly used. All other *Names*, are but in-  
 “ significant Sounds, and those of two  
 “ Sorts: *One*, when they are new, and yet  
 “ their meaning not explained by Defini-  
 “ tion; whereof there have been Abun-  
 “ dant coined by School-men and puz-  
 “ zled Philosophers. Another, when Men  
 “ make *Names*, of two *Names* whose Sig-  
 nification,

" nifications are contradictory and inconsistent,  
 " as this Name an *Incorporeal Body*, (or which  
 " is the same) an *Incorporeal Substance*, and  
 " a great Number more. For whensoever  
 " any *Affirmation* is false, the *two Names*  
 " of which it is composed, put together, and  
 " made *one*, signify nothing at all. For  
 " *Example*, if it be a false Affirmation to say a  
 " *Quadrangle* is *round*, the Word *Round-qua-*  
 " *drangle* signifies nothing, but is a mere  
 " Sound. So likewise, if it be a false Affir-  
 " mation to say, that *Virtue* can be *poured*,  
 " or *blown up and down*; the Words *in-pour-*  
 " *ed-Virtue*, *in-blown-Virtue*, are as absurd  
 " and insignificant as *round-quadrangle*. And  
 " therefore you shall hardly meet with a sense-  
 " less insignificant Word, that is not made up  
 " of some *Latin* or *Greek Names*. "

*Names* being thus derived from Accidents,  
 or Properties, he who substitutes a *Name* (*a*),  
 surely in place of his *Heir*, may be said to *Act*  
*a Lye*; for a *Name* standing in the Place of  
*reality*, no more answers the end of continu-  
 ing a particular Family, than a *Whistle*, or a

(*a*) By this violent Attachment to Names, Mankind  
 seem to abridge those few Comforts this World affords us,  
 of which Children is supposed were of the List; and for my  
 Part, I can't possibly see why a Man should be so weak and  
 perverse as not to deem as the Law does, his own Daugh-  
 ter, or Daughters, his proper Heir; and here if the Folly  
 of a Name is to become the question, why a small Matter,  
 and an Act of Parliament, or even a mere Devise in a Will,  
 will set that Matter to rights.

*Rattle*, or any other Gim-crack Fancy, would do, that was made use of to avoid a *right Answer* to a serious Question, and which can only serve the end of amusing Children and Fools, and a poor, perverse Understanding.

Further, as for *Names*, the greatest Families have none to this Day, as the *Imperial Family*, the *French*, or *Spanish* Royal Line, or our present Royal Family in *England*, which is inferior to none in Antiquity of Lustre. The Name of *Plantagenet*, which was the antient Name of our royal Family, was derived from a mere Property or Accident, such as either *walking with a Juniper-staff*, or *being whipt with small Rods on a Pilgrimage*, &c.

And for the Descendents of these *Plantagenets*, who have come to the Crown, and have had Surnames, it was totally owing to low Alliances of Particulars amongst them, who ingrafted Names in the Royal Stock, as *Tudor*, a *Welch Family*; *Steward* derived from an Office under the *Scottish* Kings: But, for the *House of Nassau*, or the *present Royal Family*, they have never been otherwise distinguished, than by the Name of *Princes*, with the Addition of their *Christian Names*; and so in the Descent of all antient Honours, they were determined with the Inquisition taken after Death, to the nearest in Blood, who, whatever Name they bore, or whatever Sex they were of, held the Land and Honour, *and so neither lost their Name or Inheritance*.

I shall



I shall instance this Matter in an Example or two, which will clearly evince the Truth of what I assert. At the Conquest, the Earldom of Warwick was given to Henry de Newbourgh, (a) born at Newbourgh in Normandy, who was succeeded by Roger his Son and Heir (b); and he was succeeded by William, his Son and Heir, who died in the Holy-Land, 15th Nov. 1184 (c), and leaving no Issue, Waleran, his Brother, succeeded him, and had Livery of the *Tertium Denarium de placitis Comitatus* (d); This Waleran left Issue Henry his Successor, and he had Livery also as above (e); and he left a Son, Thomas, who dying without Issue, his Earldom and Lands was vested in his Sister Margaret, Wife to John Marshal, Brother to the Earl of Pembroke (f); but he lived not long with her; and she afterwards married, by the King's consent, a mean Person, one John Plesjets, who was one of her Servants (a): This John, nevertheless wrote himself soon afterwards Comes Warwici: (b) but leaving no Issue by Margaret, Countess of Warwick, his Wife, on her Death, the Earldom devolved to

(a) Dug. Bar. p. 68.

(b) Ibid. p. 69.

(c) Rot. f. Rous. R. Hæd. 355. n. 30.

(d) Rot. Pip. 9 Rich. I Warw.

(e) Claus. 15. Joh. m. 6.

(f) Dug. Bar. p. 73.

(g) Dug. Warw. p. 383.

(h) Ibid. 384.

*William Maudit* (a), Son and Heir to *Alice*, the Daughter of Earl *Waleran*, which *William* had the Earldom and *Lands*; but dying without Issue, 8th of Jan. 1267, in the 52 of *Henry III.* (b) *William Beauchamp*, Son to *Isabel* his Sister, as his next Heir, succeeded him in the Inheritance of this Earldom and *Estate*, and was at that Time 30 Years of Age; whose Son and Heir was *Guy* Earl of *Warwick*, famous for his *Bulls* or *Cows*; who had Issue *Thomas*, who had Issue another *Guy*, who was Father of *Thomas*, Father of *Richard* the famous Earl of *Warwick* and *Albemarle*, who, by his first Wife, left Issue *Margaret*, second Wife of *John* Earl of *Shrewsbury*, whose Son and Heir, *John*, left a Daughter, *Elizabeth*, married to *Edward Grey*, who was Mother of *John Sutton de Dudley*, Earl of *Warwick*, Father of *Ambrose*, Earl of *Warwick*, in the time of *Elizabeth*; and by his second Wife, the above *Richard*, Earl of *Warwick*, left a Daughter *Ann*, married to *Richard Nevil*, who was Earl of *Warwick*, in her Right, and was killed at *Barnet*, 11th of *Edward IV.* His Daughter *Ann*, was married to *Edward*, Prince of *Wales*, and afterwards to *Richard III.* and the said *Richard Nevil* had also another Daughter, *Isabella*, his Joint-Heir, married to Duke *Clarence*, who had Issue by her *Edward Plantagenet*, Earl of *Warwick*, beheaded 15th. of

(a) *Dugd. Warw. p. 384.*

(b) *Ex. the 52 of Henry III. m 4.* To avoid Trouble see the Pedigree at large in *Dugdale* and *Rous.*

*Henry VII.* Thus we find in one Family, the Title of *Warwick*, descending from *Heir* to *Heir*, for several Centuries. But who from hence can discover, that the Law at all attaches itself to *Names*, must needs be more quick-sighted than I am desirous to be thought. This Pedigree, which is one of the most illustrious Families in our History, does very evidently discover the Nature, and Genius of our Law, and to this Hour, the Law of the Land is on the like footing, where particular Settlements don't interrupt its natural Course. I cannot therefore, for the Soul of me, discover, why any Man's private Conceits, or mistaken Notions, should come into competition (I mean with any grave, or serious, Person) with the known, antient, and established Law of the *Land*, and which is particularly and expressly, (as has been before shewn) founded on the open and declared Will of God in this case.

*Names*, were formerly held of much less account than *Arms*, for when *Agnes Percy* was desirous that her Husband, *Josceline* of *Lovaine*, Son to *Godfrey*, Duke of *Brabant*, should either assume her *Name* or *Arms*, he chose rather to forego his *Name* than *Arms* (a). And so little were *Names* then minded, that even this Family of *Percy*, had quited their old one of *Gernon*, or *Algernon*, long before this Marriage (b). The old Name

(a) *Dugd. Bar.* p. 270.

(b) *Ibid.* p. 269,



of the *Clifford* Family, was also changed, being at first *Ponce*: The right Name also of the *Berkley* Family is *Tits-Harding* (a); but People were then, as they are to this Day, in most other Countries, called after the Lands they held: So it was the Land that gave the Name, and indeed to this Hour even here a Name, without Land, is but of little Importance.

My Lord *Bacon* observes, (b) that however fortunate *Younger Brothers* generally are, yet that he never knew one thrive, where the *Elder Brother* was disinherited. From whence it is very evident, that this great Man supposed the disinheriting the next Heir, a Crime in the Sight of God; and the Action attended with his Curse. It is said to have been the Opinion of a very great Man, that died lately, that he thought the *Law* always made the *justest Wills*, and accordingly, when he died, he left no Will. (c)

It is fit that every one should remember, that at the same Moment of Time, an unnatural or unjust Will begins to take Place, the *Will-maker* is haled before the Tribunal of a *just God*; who will judge the Party with the same unequal and hard Measure he gives to others: for *those who judge, shall be judged*. And how much the Plea of keeping up the vainest or lowest of all earthly Matters, a *perish-*

(a) *Dugd. Bar. p. 351.*

(b) *Bacon's Essays, Civil and Moral, p. 309.*

(c) Supposed to be meant of the late Earl of *W-l-g-n-*

ing Name, or gratifying some little Revenge will avail, before God, Fools may even see and determine.

*Aristotle*, (a) defines *Justice* to be a Virtue, that preserve to every one what belongs to him, according to the Laws and Statutes of the Realm; but how such who Act perfectly contrary to the Dictates of Law and Reason, will escape his Censure, I am not able to find. And should any one attempt to blunt the Force of this Maxim with the old Cant Rule, *Nemo est Hæres Viventis*, yet this can only really mean, that no one can be any thing more than the *Heir-apparent*, or *Presumptive-Heir* of a living Man (b). And here that other Maxim of Law may in Reply be retorted, *Solus Deus facit hæredes*, It belongs to God alone to make Heirs.

*Puffendorf* saith, (c) that from the high Encomiums given to *Friendship* in Authors, may arise a doubt, whether *Friends* are not sometimes to be preferred to Relations? Of all *Societies* (says *Tully*) none hath more of Excellency, or of Strength, than when good Men. similar in Manners are united by a familiar Acquaintance. So *Homer*,

*A hearty Friend deserves a Brother's Love.*

(a) *Arist. de Orat. Lib. 1. Chap. 9. prob. 2.*

(b) See *Coke on Fee-simple, Lib. 1. Cap. 8. Notes.*

(c) *Law of Nature and Nations, Lib. 4. C. 11. Sect. 15.*

And

And Euripides,

*— A Stranger to our Line,  
If once in Mind and Manners firmly tied,  
Is worth a Thousand Kinsmen.*

And indeed it frequently happens, that we take more Satisfaction in the Company and Conversation of an indifferent Person, than of one related in Blood; and intrust many Things with the Secrecy and Fidelity of the former which we conceal from the latter: In fine, we more aptly serve the *Friend*, than the *Relation*, because he on the other Side is more ready of the two to assist us in any Difficulty.

But it cannot hence be pretended, that by Virtue of a general Custom coming up almost to the Force of Law, a *Friend* is to take Place of *Relations*, tho' the deceased Party should chance to have expressed more Tokens of Affection towards him, than towards them. For in the Business of transmitting an Inheritance, we are not guided only by *Kindness* and *Goodwill*, but we consider further, on whom it is most proper and convenient that our Fortunes should descend. And since Men are carried on by a general Propension, to wish the Family in as good Condition as possible, from which they derive their Original; therefore it is commonly most convenient, that our Goods should continue in our own Line. Besides, 'tis no necessary Consequence, to say, I was highly delighted with this Person's Familiarity and Converse; therefore it was my In-  
cli-



elination likewise, to transfer my *Possessions* upon him. For this *Friendship* betwixt Persons not allied in Race, generally extends no farther, than to a mutual Signification of *Good-will*, a Communication of Designs, and the ordinary Services and Offices of Life. But, before I can be conceived to have join'd Houses, as it were, with a Stranger, by conveying to him my Estate, it will be necessary to make an exprefs and legal Will for this purpose. Yet when we are about to dispose of our Goods, we are seldom sway'd by this Consideration, to favour a *Friend*, more than a *Relation*. *Hesiod's* Advice will here be good,

*First in your Friendship, let your Brother stand,  
So nearly join'd in Blood, the strictest band. (a)*

COOKE.

*Lastly*, the Degrees of Kindred are easily distinguished and reckoned up, but who will undertake to settle the Degrees of Friendship, in so exact an Order as to leave no room for Cavil or Dispute? But still, it is urged with better Pretence, that those Friends at least are to be prefer'd to Relations, in this case of Succession to Estates, by whose Bounty, Counsel, or Assistance, the respective Estate was required; it is being but equitable, that the Goods should return to the Place, from whence they originally flowed; Yet, here likewise, there will be most plentiful Matter for *Contention*; the avoiding of which, ought to be the chief View of all Laws. For a *Friend* putting in his Claim with such a Plea, might be well answered to this Purpose,

(a) *Op. & Dies, Lib. 2.*

H

That

That either what he takes for Merit, was not the *conferring*, but the *returning* of a Kindness. Or, that if he was the *first* Benefactor, he hath *since* receiv'd a sufficient Requit. Or, that he gave without any Hope or Prospect of Return; and desired that his Bounty should reach not to the *Person* only, but to the *Family* of his Friend. Or, that what he did was undertaken upon the Principle of Glory, or of present Advantage: (a) That in case we had not found his Assistance, we did not want Opportunity of being relieved in our Distress by other

(a) Dr. King in his preliminary Discourse to the Origin of Evil, saith, " That whenever the *particular End* of an Action, is the Happiness of another (tho' the Agent designed thereby to procure himself Esteem and Favour as a Means of his private Happiness, the Action is *meritorious*. But when an Agent has a view in any particular Action, distinct from my Happiness, and that View is the *only Motive* to that Action; tho' that Action promote my Happiness to ever so great a degree, yet, that Agent requires *no Merit*, i. e. he is not thereby entitled to my Favour or Esteem: Because Favour and Esteem are due from me for an Action, no farther than that Action was undertaken upon my Account. If therefore my Happiness is only the pretended End of that Action, I am imposed on if I believe it *real*, and thereby think myself indebted to the Agent; and am discharged from an Obligation as soon as I find out the Cheat, But it is far otherwise, when *my Happiness* is the *sole End* of that Particular Action, i. e. (as I have explained myself above) when the Agent endeavours to promote *my Happiness* as a Means to procure my Favour, i. e. to make subservient to his Happiness, as his ultimate End: tho' I know he aims at my Happiness, only as a means of his own, yet this lessens not the Obligation.

" There is one Thing, I confess, which makes a great Alteration in this Case, and that is, whether he Aims at my Favour *in general*, or only for some *particular End*. Because, if he aims at *my Happiness* only to *serve himself* in some particular Thing, and therefore, am I under less Obligation (*Ceteris paribus*) the more particular his Expectations from me are; but under Obligation *I am*."

I think, in the Case of Merit, Abp. King appears a much better Casuist than the Baron Puffendorf. See King's Orig. of Evil. p. 26.

Means,

Means. *That*, it cannot certainly be determined how much his Aid (*a*) contributed to the acquiring those Goods which he demands to inherit. And then again, that he who hath been only useful to us in getting a Thing, cannot presently require, that we should admit him to hold the Thing in common with us. *Farther*, that the *good Offices* of Friends, would be turned into a *mercenary Service*; or rather, into *perfect Usury*, if they were to be advanced to the Estate of their Friends, before the Relations of the Family: for then a Kindness to another could not be supposed to be conferred with any other Design, than that the Receiver should, only for a little Time, be the Steward and Keeper of what was bestowed; or should restore it with large Increase at his Death; therefore the Right of the Kinsmen shall obtain, yet so as that, together with the Goods of the Deceas'd, shall likewise take upon themselves his Obligation towards this great Benefactor: And shall endeavour, as far as in them lies, to repay it in the most grateful Manner, acknowledging by whose Assistance they arrive at so ample an Inheritance. Nor, is it reasonable for any Man obstinately to urge against this Judgment, that saying of *Aristotle*, "*We ought rather to requite a Benefactor, than to oblige a Friend,*" if both can be done to-

(*a*) Besides all the plausible Reasons given by *Puffendorf*, for under-rating a Favour received, *Mr. Hobbes* has given another, which, I wonder to see omitted. "To receive, says he, from one, to whom we think ourselves equal, greater Benefits than there is Hopes to requite, disposeth to *counterfeit Love*, but really *Hatred*. And puts a Man into the Estate of a desperate Debtor, that in declining the Sight of his Creditor, tacitly Wishes him where he might never see him more." *Leviathan*. p. 48.



gether. Or that of Cicero, "*There is no Duty more necessary, than that of repaying Kindnesses.*" And again, "*There being two kinds of Liberality, one of bestowing, the other of returning a Benefit, whether or no we will bestow, depends on our own Choice: But, not to return the Favour of a good Man is absolutely unlawful, provided it may be done without injuring any other Person.*" Because indeed, the Business of *Successions* by no means can be, or ought to be, exactly squared in all respects according to the Rules observed in conferring, and in returning *Benefits*. For the *latter* are guided by the Virtues of Humanity and Bounty, and properly speaking, are vouchsafed to those only, who had no ground to expect them from us, but what is owing to the Suggestions of these Virtues in our Mind. Whereas, the *former* are built upon other Foundations, on the Obligation we lie under of making provision for some particular Persons, on account of nearness of Blood: And on that Propension to advance, improve, and preserve our own Family, enjoyn'd by the Dictates of Nature. And in this Affair, that which ought to be our principal Case, is, that we establish so clear a Method, as shall be exposed as little as possible to Controversy and Doubt: Now there can be no such Way or Method more ready than this; that the Inheritance shall pass down, according to the different Degrees in which the Relations of the deceased stood nearer to him, one than the other.

Hence Authors have remarked, that *Successions by Descent*, proceed in a contrary Course

to the Rule of *common Kindness*; it being in the *former*, the more necessary Duty to *give*; in the *latter* to repay. As in the Case before us, our Children have the preference of our Parents, to whom we are much more indebted and engaged, Yet in what hath been here offered, I would not be understood to insinuate as if the Duty of Gratitude, were to be allowed no Place in the last Disposal of our Fortunes; for proper Methods by way of Legacy, which shall not affect the Inheritance may be ordered, as amply to evidence a proper Gratitude and Respect

From what hath been laid down, it appears, that of all the Collateral Line, the *Brothers* stand nearest to the Inheritance; as well on account of the most sweet and hearty Affection, by which they commonly are engaged to us; as because they, on the Score of raising their Brother's Fortunes, received smaller Portions out of their Father's Estate; with whom the *Sisters* are likewise to be admitted, at least to those Goods which were either brought by the mother, or lately acquired; but they have not the same Title to their Father's Possessions, which are usually designed to preserve the Splendor of the Family: Whereas, Women, for the most part, marry out of their own Line; Brothers, by the Father's side, in the paternal Inheritance, exclude those of the Mother's side. As again, in the Fortunes left by the Mother, the *latter* have the Preference of the *former*, in Goods newly gotten; since the Time that my Father married the Mother of my half Brothers, 'tis convenient that I should

should carry off the largest Share. Towards the acquiring of these Goods, the Man usually contributes more than the Woman; and upon default of Brothers, the Brothers Sons shall come in: Though it should seem that these ought at the same Time to let in their great Uncles, because they too had smaller Fortunes on account of dividing the Estate with the Father of the Deceased. The same is to be said of Sister's Sons and their great Uncles by the Mother, with regard to the Mother's Goods. And this Order and Method may be continued down in all other Instances; but still, with this Proviso, that where the paternal Line fails, there the Mother's Kindred shall be admitted to the Father's Estate, and so the Kinsmen by the Father, to the Mother's Goods, upon Failure of her own Line.

*Aristotle*, (a) is against Inheritances being past by Will, and, as has been before hinted (b), antiently People had scarce any other Right to bequeath, than to recommend so and so to their next Heirs; but some, in order, and the better to enforce their Wills, procured Oaths of compliance from their Heirs in their Lifetime. *Plutarch* observes, (c) that *Lycurgus* in the *Agrurian Law*, obliged every one to leave his House and Lands to his Heir. This Law, says he, was broke through by one *Epitadeus*, the *Ephore*, a Man of a factious and violent Spirit, and for some Reason incensed against his Son; he procured a Decree that any Man should dispose of his Land by Gift, or Sale, or by their last Will and Testament. Which, being promoted by him, to satisfy

(a) *Polit. Lib. 5. cap. 8.* (b) See p. 55. (c) In *Agis.*



a Passion of Revenge, and through Covetousness consented to by others, an excellent Institution was abrogated: The effect whereof was, that the money'd-married Men coveting to possess the Lands, the right Heirs were by degrees disinherited; and all the Wealth being in the Hands of a few, the Generality were poor and miserable; liberal Arts and Sciences were neglected, and the City was filled with a mean sort of Mechanicks, always envious, and hating the Rich. " There did not, (says he) " on this Account, remain above seven Hundred of the old *Spartan* Families, of which, " perhaps, one Hundred might have Estates in " Land; the rest had neither Wealth nor Honour, were sluggish in performing in the " War abroad, and ever greedy of Novelty and " Change at Home. "

And, in his *Life of Solon*, he records, that he first, by a Law, permitted the *Athenians* to make Wills.

*Tacitus* saith, (a) that of old, in *Germany*, every Man's Children inherited as his Heirs or Successors. Wills, says he, they make none. For want of Children, the next of Kin inherits, his own Brother, those of his Father or Mother. To antient Men, the more they abound in Descendants, in Relations and Affiances, so much the more Favour and Reverence they obtain.

This Rule obtained also with us, in regard to Land, so late down as 32 of *Henry VIII.* (b) And the Reason for altering it then, is as the

(a) *Heredas tamen successoresque sui cuique liberi: & nullum testamentum. De Mor. Germ. p. 419. Amst. 1637.*

(b) See the Statutes at large, 32 of *Hen. VIII. Ch. 1.*

Act recites, *the better to enable People to bring up and provide for their Families.* And not with a View, (as is too often the Case,) of putting it into the Power of an *unjust Person*, to beggar their Families, in favour of a fawning, sycophant Crew, that like Crows daily hover over the departing Carrion.

Perhaps it may be said, that, whatever a Man gets or saves, he hath a natural Right to dispose of: And on the other Hand, that what he inherits from his Ancestors should be continued, by the same Rule he took it by, *viz.* Descent; we shall not indeed be far from the Truth, tho' at the same Time, I think, no Man can, with strict Justice, deprive his right Heir of the natural Right of inheriting his Substance; except it be even almost for as great a Crime, as the Law itself would require to be made plain, before an Heir can be set aside. And as to all little, idle, Family-Disputes (*a*), they can in no Degree, be a Reason for doing the most harsh and unnatural Action in the World. For, as to our Children and Relations, we can perhaps fix no better Rule to go by, with Regard to them, than that excellent one pronounced and laid down by the Author of all true Justice and Right, *viz.* *not only to forgive one's Brother seven Times, but seventy Times seven.* And thereby we shall approach the nearest to that golden Rule of *doing to others, even that which we would that others should do unto us,*

(*a*) It is a received Law in the Kingdom of *Tonquin*, that all Quarrels between Persons nearly allied, are not to be brought before a *Court of Justice* to be determined; but the Dispute is to be settled by the Decision of the *common Kindred*. See *Alec. de Rhodes Itin. Lib. 2. C. 7.*

F I N I S.

THE  
Last Will and Testament  
OF *A* *the*  
PREMIER *✓*  
*Viscount of England*  
WITH  
REMARKS.



## ADVERTISEMENT.

*IT has not been unusual, nor unfashionable of late to publish the last Wills and Testaments of Persons of Note and Consideration, this is done so, in Vindication of the Honour and Character of the Testator, as it shews how far Artifice, Insinuation, and Craft may prevail on, and be able to sway and delude a weak tho' noble Mind.*

*It may be likewise consider'd so far interesting to the Publick and Posterity, that being laid before them, it may be a standing Lesson of Caution to all of high or low degree; so that if the foregoing Treatise does not but in the general point out what Men ought to do in Cases of Wills, (as Circumstances in Life are infinitely various) this may serve as A CONSTANT EXAMPLE OF WHAT OUGHT NOT TO BE DONE.*

*Herein it appears, the Advisers, or Suggesters to the Premier V——t of England, as far as in them lye, divest not only his Heirs at Law, Heirs Male, and all his Relations of all Denominations, of their just, natural and equitable Rights, without any real Cause or Reason assign'd, which demonstrates the Weakness as well as Iniquity of the whole.*

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T H E

Last Will and Testament of a  
*P R E M I E R*, &c.



*P*—*e*\*, *L*—*d* *V*—*t* *H*—*d*,  
being of sound disposing Mind,  
Memory, and Understanding,  
do make this my last Will and  
Testament, in Manner follow-  
ing ; *Imprimis*, I give and devise all that my  
Messuages and Lands in *Woodford* in the  
County of *Essex*, with the Rights, Members,  
and Appurtenances, to † *Robert Moxon* of  
*Gray's-Inn*, Gentleman, and to his Heirs for  
ever.

*Item*, All that my Castle of *Orford*, and all  
my Honours, Lordships, Manors, and other  
my Messuages, Lands, and Tenements,  
and Hereditaments, in the several Countries  
of *Suffolk*, *Montgomery*, *Hereford*, *Salop*,  
*Warwick*, and *Worcester*, or any of them, as

\* The usual Preamble of *In Nomine Dei*, Amen, is left  
out here, not without Reason, in such a Disposition.

† *Robert Moxon*, (usually stiled Lord *Moxon*, from the un-  
due Influence he had obtained over his Lordship) and had  
persuaded him that his Estate was deeply in Debt. which, as  
his Attorney, he thought himself best Judge of—and proper  
that it should be disposed of partly to himself.

well

well Freehold as Copyhold, and whereof I am seised, or any Person or Persons in Trust for me, either in Possession, Reversion, Remainder, and all other my real Estate of Inheritance whatsoever, and wheresoever, except my Messuages †, Lands, Tythes, Tenements, and Hereditaments, in the County of *Pembroke*, which I will shall go with the Title, and my ‡ Reversion, or Right of Reversion, to the Estate settled, and directed to be settled, by the late Lord Viscount *H—d* on *Pryce Jones*, which I will shall descend to my Heir at Law.

I give and devise to *Thomas Thurston*, of the *Middle-Temple*, Esquire \*, and to the said *Robert Moxon*, and their Heirs in Trust, that they, or the Survivor, or the Heirs of such Survivor, shall, and do as soon as conveniently may be after my Decease, † make Sale of all and singular the said Premises, except before excepted, as well those in Reversion, as those in Possession, for the best Prices that can be got for the same.

And I will, That the Moneys to be raised

\* The Estate in *Pembrokeshire*, being a Grant of the Crown, attending the Title of *Hereford* as of Right, this Bequest is in effect leaving of—NOTHING.

† This Estate in *Montgomeryshire* being settled before by Deed on a Gentleman who had a numerous Family, and three Sons, may very well be deem'd the same, viz. as NOTHING—But a sham Legacy.

\* *Thomas Thurston*, Esq; of *Ipswich*, the Person who dictated this Will— He died suddenly on the 8th of *April*, 1751, sincerely repentant of this worst Act of his Life, as appeared by manifold Signs and Tokens.

by



by such Sale, together with the Rents and Profits thereof, until such Sale shall be, after the Deduction of the necessary Charges and Expences attending this Trust, be paid and applied by the said *Thomas Thurston* and *Robert Moxon*, or the Survivor of them, or the Heirs of such Survivors, in Discharge of all my just Debts, and the Legacies immediately following; that is to say, I give and bequeath unto my present Wife *E——ra V———s H——d*, the Sum of One Thousand Pounds.

*Item*, I give unto *John Allen*, late of *Tavistock-street, Westminster*, Apothecary, One hundred Pounds.

*Item*. I give to Miss *M——a C——r*, Daughter of Mrs. *C——r* of *R——n* in *L——shire*, the Sum of One thousand Pounds.

I give to *Thomas Thompson*, of *Weybridge* in *Surry*, Gentleman, the Sum of Fifty Pounds.

*Item*, I give to *Richard Price* \* my Nephew, One Thousand Pounds.

*Item*. I give to *Edward Devereux*, Brother of *George Devereux* of *Kefngwernva* in the County of *Montgomery*, Esq; One Thousand Pounds.

*Item*, I give to *Joseph Norton* †, my Steward, the Sum of Two Thousand Pounds.

† A double Portion to any of his Relations, allotted this Just Steward, of which the Reason seems plain and evident.

*Item*,

*Item*, I give to *Margaret Winstanly*, my Wife's Servant, the Sum of Five hundred Pounds.

*Item*, I give to *Millecent Edgar* of the Red-house in *Ipswich*, the Sum of One Thousand Pounds, and to *Thomas Edgar* his Brother, the Sum of Five Hundred Pounds; which said Legacies I will shall be paid to the said *Millecent* and *Thomas* respectively, at their several Ages of Twenty-one Years; and if they, or either of them, should die before they attain that Age, I will that the Legacy or Legacies of him so dying, shall fall into the Produce of my real Estates hereby demised to be sold, and all other the Legacies above by me given, I will shall be paid within Six Months next after the Sale of my said Estates. Provided nevertheless, and I do hereby direct and order, That as often as any Part of my said Estates shall be sold, my Debts being first paid and discharged, the Money arising by such Sale, or the Overplus thereof, shall immediately be divided amongst my said Legatees, in equal Proportion to their said Legacies; and paid to them in part thereof, if the whole Money arising by such Sale shall not be sufficient to discharge the Whole at one Time. And I do hereby give and bequeath the Overplus of my Rents and Profits of my said real Estates, and of the Money arising by the Sale thereof, to be equally divided, Share and Share alike, between the said *Thomas Thurston* and *Robert Moxon*.

*Item*,

*Item*, I give and bequeath to my said Wife *E——ra V———s H——d*, my Plate and Jewels, my Medals, Watches, and Rings, my Coach, and six of my Horses, to be chosen at her Discretion; and the Pictures, China, and Furniture of my Mansion-house at *Sudborne*: and the further Sum of One Thousand Pounds, to be paid to her for her immediate Occasions out of my personal Estate, as soon as conveniently may be after my Decease.

*Item*, Whereas *Leicester Martin*, Esq; deceased, my late Father-in-Law, did give the Sum of Twenty Pounds, for the Benefit of the Poor of the Parish of \* *Sudborne* aforesaid, I will that the Sum, and the Interest thereof, be made up to the Sum of Fifty Pounds, which I give and bequeath to the Church-Wardens and Overseers of the Poor of the said Parish, the Interest and Produce thereof, I will shall be laid out by them, and their Successors for ever, in the buying of Bread, to be weekly, on the Lord's Day, in the Parish Church of *Sudborne* aforesaid, by them distributed at their Discretion, to and amongst such of the poor Inhabitants of the said Parish, who shall decently and orderly attend Divine Service therein; and I desire, that my Executors herein after named will take care, that the said Money be so settled and secured, as will best answer the Purposes aforesaid.

\* Thirty Pounds left to the Poor of the Parish his Lordship lived in ONLY.



*Item*, I give and bequeath to the Churchwardens and Overseers of the Poor of the Parish of *Berew* †, in the County of *Montgomery*, to be by them laid out and disposed of for the Benefit of the Poor of the Parish, in such Manner as they shall think proper.

*Item*, I give to *Joseph Norton*, *John Spooner*, *John Butcher*, and *Margaret Winstanley*, my Servants, the Sum of Twenty Pounds a-piece for Mourning; and to the rest of my Men and Maid Servants that shall have lived with me one Year at the Time of my Decease, and be then in my Service, I give one Year's Wages, over and above all such Wages as shall be then due to them.

*Item*, I give to the said *John Butcher* my wearing Apparel and \* Shoe-buckles, if he shall be in my Service at the Time of my Decease: And I give my wearing Linnen unto the said *Margaret Winstanly*, on the same Condition.

*Item*, I give and bequeath to the said *Thomas Thurston* all my Library of Books at *Sudborne*, and elsewhere: All the rest and Residue of my personal Estate, of what Nature or Kind whatsoever. I give and bequeath to the said *Thomas Thurston* and *Robert Moxon*, their Executors and Administrators, under the same Trusts, and for the said Purposes to which I have subjected my real Estate, recited to be sold by them; and the Overplus thereof, if

† To the Parish of *Berew*, wherein his Lordship was born  
—NOTHING.

\* This is more than is given either the Heir at Law, or Heir Male of the Family, who enjoys the Title. —

any\*, to be divided equally, Share and Share alike, between the said *Thomas Thurston* and *Robert Moxon*; but if the same shall be deficient, for the Payment of Funeral and other incidental Expences, and of the above Legacies thereout by me given, I will that the same shall be charged upon, and paid out of the Sale of my real Estates directed by me to be sold. And I do nominate, constitute, and appoint the said *Thomas Thurston* and *Robert Moxon* to be my Executors of this my last Will. And I desire, that my Funeral may be decent; but as private, and with as little Expence as may be consistent therewith.

And I give to the Poor of the Parish where I shall die, the Sum of Five Pounds, to be distributed amongst them immediately after my Decease, in such Manner as my Executors shall think proper.

And lastly, I do hereby revoke all former and other Wills by me made heretofore; and declare this to be my last Will and Testament.

In Witness whereof, I have to the first two Sheets hereof set my Hand, and to the third and last Sheet my Hand and Seal this Thirtieth Day of *November*, One thousand Seven hundred Forty-Seven.

H———, L. S.

Signed, Sealed, Published, and declared, by the said *Pryce* Lord Viscount *Hereford*, as and for his last Will and Testament, in the

\* It is plain, from this and other Expressions in the Will, his Lordship thought there would not be much left, though it comes out betwixt 70 and 80,000l. or upwards--Being the very antient Patrimony of the Families of *Devereux's*, *Pryce's*, &c.

Presence of us, who in his presence, and at the Request of the said Testator, have subscribed our Names, as Witnesses thereto.

*James Lynn,*

*Tho. Clarke,*

*W. Hurnarde.*

I, the within named *Pryce* Lord Viscount *Hereford*, do give and bequeath the Sum of One Thousand Pounds to *Robert Pryce* \*, my Nephew, to be paid to him within six Months after the Sale of my real Estate within mentioned; and my Will and Desire is, that this Codicil be deemed and taken to be Part and Parcel of my last Will and Testament, and in all other Respects I do hereby ratify and confirm; in Witness whereof, I have hereunto set my Hand and Seal this Seventeenth Day of *May*, One thousand Seven hundred Forty-Eight. *Hereford.* L. S.

*Signed, Sealed, Published, and Declared by the said Pryce Lord Viscount Hereford, as and for a Codicil to his last Will and Testament, in the Presence of us, who, in the Presence of the said Testator, have subscribed our Names as Witnesses hereunto.*

*Tho. Clarke,*

*Rob. Dyffin,*

*John Richard.*

\* This young Gentleman, *Robert Pryce*, Esq; his Lordship's third Nephew, died in the *West-Indies* in his Majesty's Service, and his Lordship had been made to believe, he was dead, a great many Months before any account of it came, which accounts for the Reason of this Confirmation of the Will.

5/5/24